

**DECISION**

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

Spangenberg  
PL-I  
31601

**FILE:** B-219106.2

**DATE:** July 2, 1985

**MATTER OF:** Marquette Electronics Inc.--Request  
for Reconsideration

**DIGEST:**

1. Test conducted on low bidder's offered system on two-step, formally advertised procurement after bid opening on second step can only be used to consider bidder responsibility and cannot affect bid responsiveness.
2. Contracting officer cannot reasonably rely upon benchmark test conducted after bid opening that was not proper or fair to find low bidder nonresponsible without affording bidder an opportunity to pass a proper test.

Marquette Electronics Inc. (Marquette) requests reconsideration of our decision in Hewlett-Packard Company, Medical Products Group, B-216125.2, May 24, 1985, 85-1 C.P.D. ¶ 597. In that decision, we sustained Hewlett-Packard's protest of the rejection of its bid under the second step of a two-step, formally advertised solicitation (No. M6-4-84) for automated electrocardiography interpretive systems (AECGIS), issued by the Veterans Administration (VA). The VA rejected Hewlett-Packard's low bid for a number of reasons, including Hewlett-Packard's alleged failure of a performance test of its proposed AECGIS. Marquette's request for reconsideration only concerns this test. It alleges that our previous decision was incorrect in finding that the test requirement concerned Hewlett-Packard's responsibility, rather than its bid responsiveness. Marquette also alleges that our conclusion that the test was not properly conducted was incorrect.

We deny the reconsideration request and affirm our previous decision.

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Marquette alleges that the "fundamental premise" of our previous decision that the test requirement is a matter of Hewlett-Packard's responsibility, rather than its responsiveness, is incorrect. Marquette contends that this test requirement must necessarily involve responsiveness because it "concerns whether a bidder has unequivocally offered to provide supplies or services in conformity with the material terms and conditions of the solicitation; responsibility refers to a bidder's apparent ability and capacity to perform the contract requirements." A. Metz, Inc., B-213518, Apr. 6, 1984, 84-1 C.P.D. ¶ 386. Marquette claims that this requirement concerns responsiveness because it addresses the compliance of the product to be provided with the specifications as or bid opening and not the bidder's capability to provide that product.

We disagree. Hewlett-Packard did not condition its bid on the invitation for bids or offer in its bid to provide anything other than the system which VA had found acceptable on the first step. Moreover, the test was conducted after bid opening. Matters requested or submitted after bids are opened cannot be used to consider bid responsiveness, since it is fundamental that responsiveness is to be considered at bid opening. Zarn Inc., B-204702, July 29, 1982, 82-2 C.P.D. ¶ 93; Western Waterproofing Company, Inc., B-183155, May 20, 1975, 75-1 C.P.D. ¶ 306. Although Marquette characterizes the test as only verifying what the bidder certified in its bid as of the time of bid opening, the test data was acquired after bid opening and cannot affect responsiveness. Therefore, to the degree that this post-bid-opening performance test can be considered in reviewing Hewlett-Packard's bid, it must only concern its responsibility. See Zarn Inc., B-204702, *supra*; Alcan Rubber Co., B-212673, Dec. 5, 1983, 83-2 C.P.D. ¶ 645 (bid sample requested for and furnished after bid opening may not be used to determine bid responsiveness). See also Beaver Linoleum & Tile Co., Inc., B-215705, Dec. 3, 1984, 84-2 C.P.D. ¶ 604; Federal Aviation Administration--Request for Advance Decision, B-185071, Dec. 10, 1975, 75-2 C.P.D. ¶ 387 (bidder's compliance with specification requirements concerns bidder's responsibility where the bidder takes no exception in its bid).

Marquette alternatively argues that the performance test was properly conducted even as a test of responsibility. In our previous decision, we concluded that the test was not properly conducted essentially because Hewlett-Packard was not adequately apprised of the nature, degree, details or any ground rules of the performance test. In

sustaining the protest, we recommended that Hewlett-Packard be provided a detailed statement of the reasons its system failed the test and that it be permitted to retest its system.

Marquette disagrees with our conclusion for three reasons. First, Marquette alleges that the nature of and scope of the test were clearly stated in the solicitation. However, our previous decision specifically concluded otherwise and Marquette has provided no further support beyond this bare allegation. Second, Marquette alleges that Hewlett-Packard must have been aware of at least some of its system deficiencies as evidenced by the three times Hewlett-Packard failed to meet the test timing requirements mentioned in our previous decision. However, again, Marquette has made no further statements beyond this basic allegation in questioning our conclusion that Hewlett-Packard was not adequately informed of its system deficiencies or given a reasonable chance to correct them. Therefore, Marquette has provided no basis for our Office to overturn our decision on these points.

Finally, Marquette alleges that our decision inappropriately applied "formal benchmark testing procedures" to the test. Marquette states that these procedures were not required by the solicitation or applicable procurement regulations. Marquette alleges that our decision required "procedural due process" in making responsibility determinations which it states is inconsistent with other decisions of our Office, e.g., Lithographic Publications, Inc., B-217263, Mar. 27, 1985, 85-1 C.P.D. ¶ 357. (A contracting officer may generally make nonresponsibility determinations upon the evidence of record without affording affected bidders an opportunity to explain or otherwise defend against this evidence.)

As indicated in our previous decision, a test conducted after the second-step bid opening on a system which had been found acceptable should only be done in unusual cases. Since the test in this case was conducted by the VA as if it were a detailed pass/fail benchmark test, which had been communicated to Hewlett-Packard prior to the test, we believe reference to the general principles of basic fairness enunciated in the decisions of our Office involving benchmark tests in negotiated procurements is appropriate. These basic principles do not constitute granting "procedural due process" to the affected bidder; rather, they are factors to be considered in determining whether the test results are sufficiently valid to reasonably support a

nonresponsibility determination. In this case, since the test of Hewlett-Packard was not proper or fair, the contracting officer could not reasonably rely upon the test results to justify a nonresponsibility determination without affording Hewlett-Packard an opportunity to pass a proper test.

Based on the foregoing, our previous decision is affirmed.

A handwritten signature in cursive script, reading "Milton F. Axtell".

Acting Comptroller General  
of the United States